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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1068

VICTOR MAIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT OF FLORIDA

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THE STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT OF FLORIDA

INTRODUCTION

Petitioner, Victor Main, respectfully prays that a writ of certiorari issue to review a judgment of the District Court of Appeal for the Third District of Florida. By such judgment, the intermediate appellate court affirmed petitioner's conviction for a crime against nature. Reference to the transcript of record (two volumes) shall be made by "Tr. ": and to the Appendix (annexed) by "App. ".

OPINIONS OF THE FLORIDA COURTS

The trial court below rendered no opinion. The opinion of the District Court of Appeal appears in the Appendix (App. 1), and is reported at 143 So.2d 221. The Supreme Court of Florida's memorandum denial of certiorari is also to be found in the Appendix (App. 2), and is reported at 149 So.2d 47.

JURISDICTION OF THIS COURT

The judgment presented for review was filed on June 26, 1962 (App. 1); and a petition for rehearing was denied thereafter (Tr. 10). By order entered December 19, 1962, the Supreme Court of Florida declined to review the intermediate decision by certiorari (Tr. 11); and, on January 24, 1963, denied a timely petition for rehearing (Tr. 210-212).

This Court has jurisdiction to review the judgment complained of by writ of certiorari. *28 U.S.C.* section 1257(3); *American Railway Express Co. v. Levee*, 263 U.S. 19, 68 L.Ed. 140, 44 S.Ct. 11; *Western Union Tel. Co. v. Croco*, 220 U.S. 364, 55 L.Ed. 498, 31 S.Ct. 399.

QUESTION PRESENTED FOR REVIEW

IS THE FEDERAL REQUIREMENT FOR DUE PROCESS OF LAW VIOLATED BY A CRIMINAL COURT JUDGE WHO, SITTING WITHOUT A JURY, CONTRACTS FOR THE TESTIMONY OF THE PROSECUTION'S CHIEF WITNESS AND SUSPECTS, BEFORE HIS FINDING OF GUILT, THAT THE DEFENDANT ATTEMPTED TO SUPPRESS SUCH TESTIMONY?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Federal Constitution is, in pertinent part, as follows (*The Constitution of the United States of America*; U. S. Gov't Printing Office, 1953 edition, p. 45):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner was, by information, charged with having committed the crime against nature with one Cayetano Terreros (Tr. 14-15). At his arraignment the petitioner entered a not guilty plea and waived jury trial (Tr. 16).

The case duly came to trial before a criminal court judge, sitting without a jury (Tr. 28). The aforementioned Terreros, the first witness called by the respondent State, appeared with counsel of his own, and, invoking the privilege against self-incrimination, refused to testify (Tr. 30-31). The possibility of granting immunity to the reluctant witness was then suggested by the trial judge to the prosecutor, but no concrete result was obtained

(Tr. 32-37). The trial judge interpolated a hearing on the privilege issue, and eventually ruled that, having waived such privilege, Terreros must testify (Tr. 74-75):

> ". . . At this time the Court directs the witness to testify in this cause and to answer questions set forth by the prosecuting attorney in this court.
>
> "I will give you an opportunity, counsel, to advise your client. However, I want to remind you and I hope you don't think this is a presumption on my part, but *I want to remind you to make certain in your counsel to the witness that you have no concern for any interests other than this witness, any adverse interest of any other parties. You are not to be concerned with this, of course; otherwise, perhaps you better not advise him.*" (emphasis supplied)

Terreros persisted in his silence, and was held in contempt of court and sentenced to serve six months in jail (Tr. 75-76).

The trial was recessed until the next morning, at which time one Robert Henry Myer was the first witness called by the respondent (Tr. 79). He too refused to testify, invoking the privilege against self-incrimination (Tr. 80). The court interpolated a hearing on this issue (Tr. 81-113). However, the trial judge never reached a ruling on Myer's asserted privilege. Terreros, incarcerated since the first day of trial (Tr. 149), notified the court that second afternoon that he would testify; and Myer did the same (Tr. 113). Terreros appeared in court, but, before

testifying, asked the judge whether or not he would be prosecuted for the same crime as the petitioner (Tr. 114). At that point, belatedly taking the cue given the day before, the prosecutor announced that Terreros would not be prosecuted for the crime that his testimony would reveal (Tr. 114). The trial judge immediately "approve[d]" the agreement, and "assure[d]" the witness that he would not be prosecuted (Tr. 114).

The trial court vacated its contempt order, and the petitioner's trial was resumed (Tr. 115-117). Terreros' testimony, if believed by the trial court, was sufficient to prove the act described in the Information (Tr. 117-167). Myer's testimony, if believed by the trier of fact, established that the petitioner had committed a similar act with Myer (not charged in the Information) about seven months before the crime charged (Tr. 168-174). The third and last witness at the trial testified simply that he had arrested the petitioner (Tr. 175-176).

The trial judge found the petitioner guilty as charged, and later sentenced him to prison for an indeterminate period of six months to seven years (Tr. 24, 182). Immediately after the finding of guilty, the trial judge excused the petitioner and his attorney from the courtroom. The court then initiated a hearing which was obviously invoked by the trial judge *as a result of his suspicion that the petitioner had attempted to suppress the testimony of Terreros and/or Myer before the trial* (Tr. 171-202).

Terreros had become a member of the United States Army some three months before the trial (Tr. 30). The

trial judge, referring to such status at the extraordinary post-trial hearing, said (Tr. 191-192):

> " . . . We don't have too much control over that or what the Army will do. All I can tell you is you will not be prosecuted for any of these matters. If any charges are brought against you concerning these matters, if you will tell your superiors to contact me, I will be glad to do everything I can to discourage them from carrying it any further . . . . I will do everything I can to help you out."
>
> "*We have entered into this agreement* and I will do everything I can and I am sure the State Attorney's office will." (emphasis supplied)

Since the record does not otherwise reveal any "agreement" between the trial judge and the respondent's indispensable witness, the inference is inescapable that it was solemnized somewhere outside the courtroom!

Petitioner and his counsel had no knowledge of the extraordinary hearing until twenty eight days after it had occurred (Tr. 245-246). Thus, petitioner's attorney had no indication of the manifest prejudice the invocation and conduct of such hearing revealed, until after the time for filing a motion for new trial had expired. *Section 920.02(3), Fla.Stat., F.S.A.*

The petitioner appealed from the judgment of conviction to the Third District Court of Appeal of Florida (Tr. 25). His brief contended that he had been denied "the cold neutrality of an impartial trial judge" (Tr. 221) in violation of "the constitutional guarantees which constitute fair trial" (Tr. 222). His counsel contended on oral argument that "the trial court's prejudiced conduct of the peti-

tioner's trial constituted a violation of the due process of law required by the Federal Constitution" (Tr. 248).

The intermediate appellate court held that the trial judge was impartial (App. 1), and, by necessary implication, that the trial judge's conduct was not violative of the due process Commandments. The Supreme Court of Florida refused to review that decision by certiorari (App. 2).

ARGUMENT

This Court has held that a fair trial in a fair tribunal is a basic requirement of due process, and "our system of law has always endeavored to prevent even the probability of unfairness. . . ." *In re Murchison*, 349 U.S. 133,136, 99 L.Ed. 942,946, 75 S.Ct. 623. The Fourteenth Amendment prohibits the conviction of a defendant "whose trial is offensive to the common and fundamental ideas of fairness and right. . . ." *Betts v. Brady*, 316 U.S. 455,473, 86 L.Ed. 1595,1607, 62 S.Ct. 1252. Thus, the failure to accord an accused a fair hearing violates "even the minimal standards of due process" *Irvin v. Dowd*, 366 U.S. 717,722, 6 L.Ed.2d 751,755, 81 S.Ct. 1639.

In *Henderson v. State*, 135 Fla. 548, 185 So. 625, 627-8, the Supreme Court of Florida held that *the trial court should not make itself a party to an immunity agreement between the State and a prosecuting witness.* In the case sub judice, the trial judge himself first suggested that the respondent immunize the reluctant witnesses, and, by his own admission at the post-trial hearing, he became a party

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[1]The "specially concurring" opinion by Brown, J., was apparently approved by a majority of the Court.

to the "agreement". Indeed, he offered to spread the mantle of his office as a shield between the chief witness and the prospective disgruntlement of the United States Army, supra, p. 6.

Having apparently bargained for and obtained Terreros' testimony, which was the only evidence that could have proved the crime charged in the Information, the trial judge obviously proceeded, as trier of fact, to determine its credibility. In Florida, as elsewhere, the testimony of an accomplice is not favored, and must be received with great caution. *Roberts v. State*, 72 Fla. 132, 72 So. 649,650; *Varnum v. State*, 137 Fla. 438, 188 So. 346,351; *16 C.J.S., Criminal Law*, section 808 a, pp. 71-80. The "great caution" rule is most strictly applied where, as here, the accomplice obtains immunity as a premium for his treachery. Id., section 808 b, pp. 80-81; *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369.

It was unconscionable for the Florida appellate court to hold that the trial judge, having personally shucked the pearl of testimony from the unwilling oyster, could have received the jewel with "great caution". Since bias or prejudice are states of mind, circumstantial proof of their existence must ordinarily suffice. *48 C.J.S., Judges*, section 82 a, p. 1058.

The State of Florida follows the general rule that when a defendant is on trial for a particular crime, it is improper to admit evidence of unrelated collateral crimes. *Gordon v. State*, Fla.1958, 104 So.2d 524,533; *22A C.J.S., Criminal Law*, section 682, pp. 729-737. Clearly, then, if the petitioner had been tried by a jury, the admission of evidence proving that he attempted to suppress the testi-

mony of two of the State's witnesses would have been reversible error. See *Gordon v. State*, supra. Just as clearly, the trier of fact here suspected such an unrelated collateral crime before he reached his "impartial" verdict. Since there was no evidence adduced between the guilty verdict and the extraordinary post-trial hearing (Tr. 182-183), it is manifest that the trial judge suspected such chicanery *before he reached his verdict*. Indeed, his remarks to Terreros' counsel, on the previous day, supra, p. 4, were storm warnings of the whirlwind of suspicion that later engulfed the petitioner's right to a fair trial by an impartial judge.

In view of all the aforestated circumstances, the petitioner certainly was denied a rudimentary requirement of "due process", i.e., the cold neutrality of an impartial judge. As this Court said in *Tumey v. Ohio*, 273 U.S. 510,532, 71 L.Ed. 749,758, 47 S.Ct. 437, 50 A.L.R. 1243:

> " . . . the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."

It becomes imperative, then, for this Court to issue its writ of certiorari and review the decision of the Florida Court which held that the instant trial judge's actions comported with the federal requirement for "due process".

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A. D. 1962

CASE NO. 61-662

VICTOR MAIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

FLORIDA CIVIL LIBERTIES UNION,

Amicus Curiae.

Opinion filed June 26, 1962.

An Appeal from the Criminal Court of Record for Dade County, Gene Williams, Judge.

Frederick O. Scheske, for appellant.

Richard W. Ervin, Attorney General, and David U. Tumin, Assistant Attorney General, for appellee.

Robert J. Ramer and Simon & Rosen, for Amicus Curiae.

Before CARROLL, BARKDULL and HENDRY, JJ.

PER CURIAM.

The defendant-appellee was convicted of a crime against nature. The trial was without a jury in the Criminal Court of Record for Dade County.

The appellant contends that he was not afforded the cold neutrality of an impartial trial judge. We have carefully examined the record and considered the question raised by the appellant and find it to be without merit.

Affirmed.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962
WEDNESDAY, DECEMBER 19, 1962

CASE NO. 31,992

VICTOR MAIN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date June 26, 1962, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing was mailed to the office of the Attorney General, State of Florida; 1350 N. W. 12th Avenue; Miami 36, Florida; this 30th day of April, 1963; by depositing same in a United States Mail Box, with first class postage prepaid, addressed to the foregoing post office address.

Alfred M. Carvajal

ALFRED M. CARVAJAL
Of Counsel for Petitioner